

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD GATHRIGHT,

Plaintiff,

No. CIV S-02-1833 DFL CMK

vs.

T.L. ROSARIO, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with an action for violation of civil rights pursuant to 42 U.S.C. § 1983. Presently pending before the court are the defendants' motion to dismiss, motion to compel, and request for sanctions, all filed February 3, 2005. To date, the plaintiff has not filed an opposition to any of these motions.

**I. BACKGROUND**

On September 3, 2003, plaintiff filed an amended civil rights complaint. Defendants filed their answers on October 8, 2003 and December 9, 2003. (See Court Docket.)

On October 15, 2003, the court issued its discovery order which included permission to depose the plaintiff pursuant to rule 30(b)(1) of the Federal Rules of Civil Procedure. The court warned that any discovery disputes shall be resolved pursuant to Rules 5, 7, 11, 26, and 37 of the Federal Rules of Civil Procedure and the Local Rules of Practice for the

1 United States District Court, Eastern District of California, except for Local Rule 37-251. (Court  
2 Docket Entry No. 27.)

3 The Court issued a scheduling order setting the following dates: the deadline for  
4 completing discovery was November 5, 2004; and the deadline for pretrial motions was January  
5 3, 2005. (Court Docket Entry No. 40.)

6 Defendants noticed plaintiff's deposition for September 22, 2004, at Salinas  
7 Valley State Prison ("SVSP"). On September 21, 2004, defense counsel received a telephone  
8 call from the plaintiff in which he was told that the plaintiff had been transferred to Atascadero  
9 State Hospital ("ASH"). On October 20, 2004, defendants noticed plaintiff's deposition for  
10 November 3, 2004, in ASH. On October 25, 2004, defense counsel was again told that plaintiff  
11 had been transferred, this time to California State Prison-Sacramento ("CSP-Sac"). On October  
12 26, 2004, defendant noticed plaintiff's deposition for November 3, 2004 at CSP-Sac. However,  
13 on November 1, 2004, defense counsel was told by the litigation coordinator's office at CSP-Sac  
14 that he had been transferred again. Defense counsel was also told that this was a temporary legal  
15 transfer and that plaintiff was scheduled to return to CSP-Sac in late November. (Declaration of  
16 Benjamin T. Rice, ¶ 4.) Defense counsel asked and received from the court a thirty day  
17 extension of time to move the discovery deadline with the intention of deposing plaintiff late in  
18 November. (Rice Declaration, ¶ 5.)

19 On or about November 22, 2004, defense counsel received a notice of change of  
20 address from plaintiff stating that he was now back at CSP-Sacramento. As a result, defendants  
21 prepared to proceed with the deposition. On or about November 23, 2004, defense counsel was  
22 informed by officials at CSP-Sacramento that he was still being kept at SVSP for court hearings.  
23 Subsequently, defense counsel noticed that plaintiff's change of address to CSP-Sacramento was  
24 sent from SVSP. (Rice Declaration, ¶ 6.)

25 Defendants subsequently asked the court to move the deadlines to complete the  
26 discovery and file dispositive motions to February 5, 2005 and April 3, 2005, respectively. The

1 court granted this request. On December 8, 2004, defendants attorney re-noticed plaintiff's  
2 deposition for December 16, 2005, at SVSP. (Rice Declaration, ¶ 7; Ex. A, Re-Notice of  
3 Deposition.)

4 Defense counsel traveled to Salinas in order to depose the plaintiff on December  
5 15, 2004. (Rice Declaration, ¶ 8.) However, Correctional Officer Dominguez informed defense  
6 counsel that the plaintiff had refused to come out of his cell for Floor Officer S. Watson. (*Id.*;  
7 Ex. B, Deposition Transcript.) Defense counsel also asked Officer Dominguez to personally ask  
8 the plaintiff to come out of his cell for the deposition. Again, defense counsel was informed that  
9 plaintiff would not come out of his cell. Defense counsel then asked the court reporter to go on  
10 record and explained the circumstances of plaintiff's refusal to come out of his cell. Defense  
11 counsel also asked Officer Dominguez to set forth the events on the record. (*Id.*)

12 Defense counsel spent at least six hours preparing for the deposition, drafting the  
13 notice of taking the deposition, and at least three hours writing this motion and preparing  
14 supplemental documentation, and approximately eight hours traveling to and from SVSP. The  
15 total time spent in preparation for the deposition was seventeen hours. The California State  
16 Attorney General's Office bills at a rate of \$112.00 per hour for time expended on behalf of  
17 clients whom by law can be billed. The total amount of attorney's fees for the deposition is  
18 \$1,904. (Rice Declaration, ¶ 9.)

19 Additionally, defense counsel's travel expenses from Sacramento to San Quentin  
20 totaled \$168.26 and the court reporting costs totaled \$189. (*Id.*)

## 21 **II. MOTION TO DISMISS**

22 Defendants' move this court to dismiss plaintiff's complaint with prejudice as a  
23 sanction imposed pursuant to Fed. R. Civ. P. 41(b). "Dismissal, however, is so harsh a penalty it  
24 should be imposed as a sanction only in extreme circumstances." *Thompson v. Housing*  
25 *Authority of the City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (citing *Henderson v.*  
26 *Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986); *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir.

1 1981) (per curiam); Industrial Bldg. Materials, Inc. V. Interchemical Corp., 437 F.2d 1336, 1339  
2 (9th Cir. 1970). Dismissal is properly imposed where the losing party's non-compliance was due  
3 to willfulness, fault or bad faith. Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981). For  
4 example, if a party repeatedly fails to comply with court orders then the sanction of dismissal is  
5 warranted. Id.

6 Here, the plaintiff refused to come out of his cell to attend his deposition.  
7 Plaintiff previously moved several times between prisons, further frustrating the discovery  
8 process. Plaintiff has provided no justification for his failure to appear at his noticed deposition  
9 or his prison transfers. However, the evidence is unclear on whether plaintiff's failure to appear  
10 is due to willfulness or his inability as a pro se litigant to understand his discovery  
11 responsibilities. See, e.g., Societe Internationale Pour Participations Industrielles et  
12 Commerciales v. Rogers, 357 U.S. 197 (1958) (explaining that due process prohibits sanctioning  
13 a party, whose failure to comply with court order regarding discovery was due to inability and not  
14 willfulness, with the ultimate sanction of dismissal). Significant to the court is the fact that  
15 plaintiff only refused one scheduled deposition. Therefore, at the present time, the court will  
16 recommend that defendants' motion to dismiss be denied without prejudice.

### 17 **III. MOTION TO COMPEL**

18 In the alternative, defendants move this court to compel the plaintiff's attendance  
19 at his deposition. Again, the plaintiff has not filed any opposition to defendants' motion to  
20 compel. The undersigned has the authority under L.R. 72-302(c)(1), to order plaintiff to be  
21 deposed. Therefore, pursuant to the Local Rules, this court will order the plaintiff to cooperate  
22 with the defendants in the taking of his deposition and grant defendants' motion to compel.  
23 Another failure, by the plaintiff, to cooperate in the taking of his deposition will result in a  
24 dismissal of this action.

25 ///

26 ///

1 **IV. REQUEST FOR FEES AND COSTS (SANCTIONS)**

2 Finally, defendants ask this court to award them reasonable expenses, including  
3 attorney's fees, pursuant to Fed. R. Civ. P. 37(b)(2). The trial court has broad discretionary  
4 powers to impose sanctions pursuant to Rule 37(b). See Liew v. Breen, 640 F.2d 1046, 1050  
5 (9th Cir. 1981).

6 As a result, the court finds that defendants' request for sanctions is perfunctory  
7 under the current circumstances. The plaintiff may have misunderstood his rights regarding  
8 appearance at his deposition in front of defendants' attorney. Moreover, the plaintiff is an inmate  
9 at California State Prison Sacramento. There is no evidence that plaintiff has the assets with  
10 which to pay costs and attorney's fees. Although, the plaintiff did pay his filing fee, it is doubtful  
11 that the plaintiff will earn enough in prison to pay the \$1,904 in attorney's fees, not to mention  
12 the costs estimated by defendants. Even though plaintiff's inability to pay should not be the sole  
13 reason for the court's denial of monetary of sanctions, it can be considered as one factor. Warren  
14 v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994). The court will be more inclined to award  
15 defendants reasonable expenses in the future if the plaintiff continues to refuse to be deposed and  
16 disobeys this court's present order. Thus, the court will deny without prejudice, defendants'  
17 motion for reasonable expenses, including attorney's fees.

18 **V. CONCLUSION**

19 Defendants have announced their intention to file a motion for summary  
20 judgment if their motion to dismiss is denied. Defendants argue that they have been unable to  
21 file their planned motion for summary judgment because of plaintiff's refusal to participate in his  
22 deposition. As a result, the court will vacate the upcoming trial date scheduled for July 11, 2005  
23 and reset the deadlines for pretrial motions. Discovery will be formally closed with the exception  
24 of plaintiff's deposition.

25 ///

26 ///

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. Defendants' motion to compel, filed February 3, 2005, is granted;

3 2. Defendants' request for sanctions, filed February 3, 2005, is denied without  
4 prejudice;

5 3. Discovery is formally closed with the sole exception that the defendants have  
6 until and including the date of July 1, 2005, to depose the plaintiff;


7 4. The date to file pre-trial motions shall be extended to and including August 1,  
8 2005; and

9 5. The trial date currently set for Monday, July 11, 2005 at 9:00 a.m. in front of  
10 Chief Judge David F. Levi, is hereby vacated.

11 In accordance with the above, IT IS HEREBY RECOMMENDED that  
12 defendants motion to dismiss, filed February 3, 2005, be denied without prejudice.

13 These findings and recommendations are submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen  
15 days after being served with these findings and recommendations, any party may file written  
16 objections with the court and serve a copy on all parties. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
18 shall be served and filed within fifteen days after service of the objections. The parties are  
19 advised that failure to file objections within the specified time may waive the right to appeal the  
20 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 DATED: May 24, 2005.

22  
23   
24 **CRAIG M. KELLISON**  
25 UNITED STATES MAGISTRATE JUDGE  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26